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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 OKSANA KOTOK,

8 Plaintiff,

9 v.

10 NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

11 Defendant.

Case No. 2:17-cv-00191-BAT

**ORDER GRANTING PLAINTIFF'S
MOTION FOR EAJA FEES**

12 Oksana Kotok appealed the denial of her application for disability benefits under Title II
13 and supplemental income benefits under Title XVI of the Social Security Act. Dkt. 1. On July
14 5, 2017, the Court reversed the decision of the Commissioner and remanded the case for further
15 administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g). Dkt. 12. On
16 remand, the ALJ was directed to clarify his assessment of Ms. Kotok's English language
17 proficiency and determine how language limitations impact her ability to perform jobs otherwise
18 available and existing in significant numbers in the economy. *Id.* at 14-15.

19 Ms. Kotok seeks an award of fees in the amount of \$1,959.50 under the Equal Access to
20 Justice Act ("EAJA"), 28 U.S.C. § 2412. She is not seeking costs. Dkt. 14, 14-1. The
21 Commissioner argues no fees should be awarded because her position in the case was
22 substantially justified or in the alternative, any fees awarded should be reduced because the fee
23 sought is unreasonable in light of the limited nature of plaintiff's success. Dkt. 15. For the

1 reasons discussed below, the Court **GRANTS** plaintiff's motion for EAJA attorney fees of
2 \$1,959.50.

3 **DISCUSSION**

4 The EAJA authorizes payment of attorney's fees to a prevailing party in an action against
5 the United States, unless the court finds that the government's position on the merits in the
6 litigation was "substantially justified." 28 U.S.C. § 2412(d)(1)(A). Ms. Kotok is the "prevailing
7 party" as she received a remand pursuant to sentence four of 42 U.S.C. § 905(g) for further
8 administrative proceedings. *Flores v. Shalala*, 49 F.3d 562, 567–68 (9th Cir. 1995).

9 **A. Substantial Justification**

10 To show that its position was "substantially justified" the government must demonstrate
11 that its position had a reasonable basis in both law and fact at each stage of the proceedings.
12 *Tobeler v. Colvin*, 749 F.3d 830, 832–34 (9th Cir. 2014).

13 The Commissioner argues the ALJ's decision was substantially justified because it was
14 reasonable to conclude that specific limitations (no writing reports or reading instructions in
15 English) were only inconsistent with Level 3 jobs (not Levels 1 and 2) and a more realistic
16 approach would be to look at the first level that requires "using correct English." *Id.* at 3-4.

17 The Court actually found: (1) the ALJ's conclusion at step 5 that Ms. Kotok "is able to
18 communicate in English" is internally inconsistent with his finding that Ms. Kotok had "limited
19 communication in English" and was restricted to jobs with no requirement to read instructions or
20 write reports in English; (2) neither the ALJ nor the Vocational Expert ("VE") addressed how an
21 inability to read instructions or write reports with a limited communication in English would
22 impact Ms. Kotok's ability to find and perform the jobs identified by the VE; (3) the ALJ failed
23 to inquire whether the VE's testimony was consistent with the Dictionary of Occupational

1 (“DOT”) titles, or reasonably explain why he relied on testimony that conflicted with the DOT;
2 and (4) even assuming Ms. Kotok can perform the jobs posited by the VE requiring only Level 1
3 language skills, the error was still not harmless because, after eliminating the Level 2 language
4 skills positions, no significant number of jobs existed. Dkt. 12 at 5-10.

5 Thus, the Commissioner has failed to demonstrate both the underlying agency position
6 and her position on appeal were reasonably based in law and fact and therefore substantially
7 justified.

8 **B. EAJA Standards: Reasonableness of Fees**

9 The next question is whether the fees requested by Ms. Kotok are reasonable, both in
10 terms of the hourly rate and number of hours expended. *Costa v. Comm'r of Soc. Sec. Admin.*,
11 690 F.3d 1132, 1135 (9th Cir. 2012) (using lodestar method, court multiplies the number of hours
12 reasonably expended on the litigation by a reasonable hourly rate, excluding hours that are
13 excessive, redundant, or otherwise unnecessary).

14 Ms. Kotok’s requested hourly rate (\$195.95) is the same as the Ninth Circuit’s published
15 statutory maximum EAJA rates for the first half of 2017.¹ The number of hours spent on this
16 case – 10 hours – is also not objectively unreasonable as compared with similar cases. *See*
17 *Costa*, 690 F.3d at 1136 (20 to 40 hours is the commonly requested and granted range of hours
18 for social security appeals). The Commissioner argues, however, that the fees requested are
19 unreasonable because Ms. Kotok prevailed on only one issue, did little work on that issue, and
20 did not receive an award of benefits. Dkt. 15 at 4-5.

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23 ¹ *See*: http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039 (statutory maximum rate for the first half of 2017 is \$195.95).

1 “It remains for the district court to determine what fee is ‘reasonable.’” *Hensley v.*
2 *Eckerhart*, 461 U.S. 424, 433 (1983)). Where “a plaintiff has achieved only partial or limited
3 success, the product of hours reasonably expended on the litigation as a whole times a reasonable
4 hourly rate may be an excessive amount . . . [T]he most critical factor is the degree of success
5 obtained.” *Id.* at 436; *accord Thomas v. City of Tacoma*, 410 F.3d 644, 649 (9th Cir. 2005).

6 The amount of fees sought in this case is clearly not excessive. Moreover, the Court
7 declines to penalize Ms. Kotok when her counsel correctly spotted and raised the ALJ’s error in
8 failing to fully consider the effects of Ms. Kotok’s limited English proficiency when those
9 effects determine whether Ms. Kotok can actually find and perform work.

10 CONCLUSION

11 The Court **GRANTS** Ms. Kotok’s motion (Dkt. 14) and **ORDERS** the Commissioner to
12 pay plaintiff’s attorney fees of **\$1,959.50**. If the EAJA fees are not subject to any offset allowed
13 under the Department of Treasury’s Offset Program, then the check should be made payable to
14 Ms. Kotok’s attorney, Ryan A. Johnson, based upon Ms. Kotok’s assignment of these amounts to
15 counsel. Any check for EAJA fees shall be mailed to David B. Vail, Jennifer M. Cross-
16 Euteneier & Associates, at 819 Martin Luther King Jr. Way, Tacoma, WA 98415-0707.

17 DATED this 22nd day of September, 2017.

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19 BRIAN A. TSUCHIDA
20 United States Magistrate Judge
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